(2)

NO. 95-493

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

THE STATE OF OKLAHOMA,

Petitioner,

v.

JOSE FLORES FLORES,

Respondent.

On Petition for Writ of Certiorari

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. PETITIONER FAILED TO PROPERLY ESTABLISH JURISDICTION.

II. THE OKLAHOMA JUDGMENT BELOW RESTS ON INDEPENDENT STATE GROUNDS.

III. THE OKLAHOMA JUDGMENT DID NOT FIND DUE PROCESS ERROR AS TO THE MATERIAL ALLEGATIONS INSTRUCTION PRECLUDING REVIEW BY THIS COURT.

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12 O.S. 1991, Sec. 577.2 . . . . . 1, 6

22 O.S. 1991, Sec. 836 . . . . . 1, 5, 6, 7, 8

PROVISIONS RELIED UPON

22 O.S. 1991, Sec. 836

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in a case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted.

12 O.S. 1991, Sec. 577.2

> Whenever Oklahoma Uniform Jury Instructions (OUJI) contains an instruction applicable in a civil case or a criminal case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the OUJI instructions shall be used unless the court determines that it does not accurately state the law...

Oklahoma Uniform Jury Instruction - Criminal, 1981, No. 903

> The defendant(s) [is] [are] presumed innocent of the crime(s) charged, and the presumption continues unless, after consideration of all the evidence, you are convinced of [his] [her] guilt beyond a reasonable doubt. The State has the burden of presenting the evidence that establishes guilt beyond a reasonable doubt. The defendant(s) must be found not guilty unless the State produces evidence which convinces you beyond a reasonable doubt of each element of the crime.

STATEMENT OF THE CASE

The Respondent, Jose Flores Flores, was convicted of the crime of Murder in the First Degree in Tulsa County, Oklahoma, in Case No. CF-92-4472, and received a sentence of life imprisonment without parole.

The Respondent raised seven propositions of error on appeal, two of which were addressed by the Oklahoma Court of Criminal Appeals in reversing his conviction. Flores v. State, 896 P.2d 558 (Okla. Crim. App. 1995). The two grounds related to the instructions of the trial court that the Respondent was presumed to be not guilty and that the prosecution had the burden to prove the material allegations of the information beyond a reasonable doubt before the jury could convict the Respondent. The Oklahoma Court of Criminal Appeals found reversible error as to the presumption of not guilty instruction but made no finding of error as to the proof of material allegations instruction except to notice the probability of confusion and to prohibit its use in future cases.

The State filed a petition for rehearing urging that if the instruction on the presumption of being not guilty was error, it was only a violation of state law and subject to harmless error analysis; and further, that the decision should be given prospective effect only. The Court of Criminal Appeals denied the petition for rehearing. Flores v. State, 899 P.2d 1162 (Okla. Crim. App. 1995).

SUMMARY OF ARGUMENT

Petitioner failed to properly plead jurisdiction by invoking 28 U.S.C. Sec. 1254 which deals exclusively with federal cases and necessitates denial of the certiorari petition.

The judgment below finding the submitted instruction presuming the Respondent not guilty to be error relied solely and exclusively on state grounds. Flores v. State, 896 P.2d 558, 559-560 (Okla. Crim. App. 1995). The subsequent discussion of Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976) and finding of constitutional error does not defeat the independent and adequate state grounds. Sochor v. Florida, 504 U.S. ____, 112 S.Ct. 2114, 2119, 119 L.Ed.2d 326 (1992).

Moreover in the present case, where the issue presented is episodic and jurisdictionally limited to one judge in one state, the issues fail to meet the importance requirement, a critical consideration in this Court's decision to grant certiorari. Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S.Ct. 614, 616, 99 L.Ed.2d 897 (1955). Flores v. State, 899 P.2d 1162, 1170 (Okla. Crim. App. 1995) (Order Denying Rehearing) (Johnson, P.J., dissenting).

The judgment below did not find error as to the submission of the instruction as to proof of the material allegations as opposed to the elements of the offense. Absent a finding of error below, jurisdiction does not rest with this Court thus certiorari consideration of this issue is precluded. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 2323, 76 L.Ed.2d 527 (1983).

REASONS TO DENY CERTIORARI

I.

PETITIONER FAILED TO PROPERLY ESTABLISH JURISDICTION

The rules of this Court require Petitioner to properly plead jurisdiction. Supreme Court Rule 14(e)(iv). Petitioner in the present case invokes this Court's jurisdiction based on 28 U.S.C. Sec. 1254. That provision establishes this Court's jurisdiction in federal cases exclusively. The petition for certiorari should therefore be dismissed for failure to establish jurisdiction.

II.

THE OKLAHOMA JUDGMENT BELOW RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

This Court will not recognize jurisdiction over a state court's treatment of an issue of federal law if (1) the lower decision rests on an adequate and independent state ground, or (2) the lower court's opinion indicates clearly and expressly that the state ground is an alternative holding. Socher v. Florida, 504 U.S. ____, 112 S.Ct. 2114, 2119, 119 L.Ed.2d 326 (1992). Both conditions exist in the present case.

In Flores, the Oklahoma Court of Criminal Appeals arrived at its conclusion of error without reliance on any federal law. The Court observed that the presumption of not guilty instruction given to the jury differed from a state uniform instruction setting forth the presumption of innocence, in light of an Oklahoma statute mandating use of the uniform instructions in all trials. Flores,

896 P.2d at 558, citing 12 O.S. 1991, Sec. 577.2. The Court concluded:

> "Because [the uniform instruction] correctly sets forth the presumption of innocence and 12 O.S. 1991, Sec. 577.2 requires trial courts to administer the uniform instructions, we find it was error to deviate from [the uniform instruction]."

Id.

To this point in the Court's discussion there was no allusion to federal law.

The Court of Criminal Appeals next took up the question of whether the error was reversible. A lengthy discussion culminated in the finding that

> "the presumption was so undermined by the instruction given that the constitutional and statutory protection ordinarily afforded thereunder was effectively denied."

Id. at 562.

The opinion makes clear that the presumption of innocence has long enjoyed an independent vitality in Oklahoma statutory law and jurisprudence. The Court observed that "The presumption of innocence until proven guilty is a right guaranteed by statute", Id. at 560, and recited 22 O.S. 1991, Sec. 836:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted.

[896 P.2d at 560, n.3]

Further, the Oklahoma Court explained the dimensions of the presumption of innocence relying on generous quotations from Miller v. State, 3 Okl.Cr. 374, 106 P.538 (1910) and Horn v. Territory, 8 Okl.Cr. 52, 56 P. 846 (1899). 896 P.2d at 560-61. Examination of those cases reveals that they were wholly based on earlier identically-worded incarnations of 22 O.S. 1991, Sec. 836, without reference or resort to federal authorities.

There is even one important respect in which Oklahoma extends a greater scope of protection than does federal law. The Court recognized that the United States Constitution does not require an instruction on the presumption of innocence in every case. 896 P.2d at 561. It did, however, visit the longstanding Oklahoma rule that an instruction on the presumption of innocence must be given in every trial, citing Jenkins v. State, 11 Okl.Cr.168, 145 P. 500 (1914), and reiterated it in light of an applicable state uniform instruction and a statute mandating the use thereof in all trials. 896 P.2d at 560-62.

It is therefore apparent that Oklahoma case and statutory law has fully developed the presumption of innocence, without dependency on, or even ties to, federal doctrine. References to this jurisprudence are explicit and profuse throughout the Flores opinion. Clearly the presumption of innocence held to have been undermined is an adequate and independent state creature. See Flores, 899 P.2d at 1164-65, Order Denying Rehearing (Chapel, V.P.J., specially concurring) ("A majority of this Court finds the

error in this case to be a substantial violation of a statutory right.")

The Petitioner states in its Summary of the Argument that the gist of the Oklahoma ruling is that

> "an instruction advising the jury that the defendant is presumed to be not guilty is a misstatement of law diluting the principle that guilt is to be established by probative evidence and beyond a reasonable doubt."

The Respondent has already explained that the finding of error was founded on the trial court's deviation from a uniform instruction, and the finding of reversibility was founded on the recognition that "the presumption was...undermined." 896 P.2d at 560, 562. Even as the Petitioner frames the issue, the state ground is independent and adequate to fully support the Court's disposition. 22 O.S. 1991, Sec. 836 links the presumption of innocence to the burden of proof as a matter of Oklahoma law. ("A defendant in a criminal action is presumed to be innocent until the contrary is proved..."). The Court of Criminal Appeals stated and restated this state doctrine while quoting from the seminal cases of Miller and Horn, 896 P.2d at 560-61.

A prime policy consideration underlying this Court's decision of whether to assume jurisdiction is concerned with whether the same judgment would be rendered by the state court after its views of federal law are "corrected", thus rendering the reversal into nothing more than an advisory opinion. Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). The Respondent

has shown that Oklahoma's law regarding error and prejudice in the context of the presumption of innocence is fully and independently developed. The Oklahoma Court of Criminal Appeals appears to have a strong resolve to enforce its statutes regarding uniform instructions and the presumption of innocence by means of reversing Flores' conviction for new trial.

Finally, this case does not meet the requirements of importance set forth by this Court's rules. Supreme Court Rule 10(b). This Court has previously declined certiorari on cases either "academic or episodic." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S.Ct. 614, 616, 99 L.Ed.2d 897 (1955). The present case appears to fall in the episodic category. As noted in the Oklahoma opinion, only one other court appears to have administered a presumption of "not guilty" instruction and that case was distinguishable. Flores, 896 P.2d at 562 n. 7. This case appears to be limited even within Oklahoma to one particular judge. According to Presiding Judge Johnson, "...the problem was created by a District Judge who did not follow the law and use the OUJI instructions as required to do." Flores, 899 P.2d at 1170 (Order Denying Rehearing). Although the principle involved is important, the presentation of error below is atypical and isolated jurisdictionally. It would therefore be improvident for this Court to grant certiorari in this case.

III.

WHERE THE OKLAHOMA JUDGMENT DID NOT FIND THE "MATERIAL ALLEGATIONS" INSTRUCTION A VIOLATION OF DUE PROCESS, REVIEW BY THIS COURT IS PRECLUDED.

The Oklahoma Court of Criminal Appeals reversed and remanded holding that the "presumption of not guilty" instruction violated the Respondent's rights. Flores, 896 P.2d at 562. The Oklahoma Court then considered independently whether it was error to submit a burden of proof instruction as to the "material allegations" as opposed to elements of the offense. Id., at 562-563.

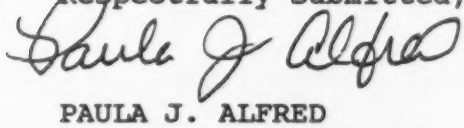
Without finding a due process violation, the Oklahoma Court concluded such instruction "may be confusing" and prospectively prescribed that the instruction not be given in the future. Id., at 563.

Notably absent was a finding of error in the present case or a discussion of the effect such error had and the relief warranted. This Court will not find jurisdiction over an issue not pressed or passed upon below. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 2323, 76 L.Ed.2d 527 (1983). Clearly the question proposed for consideration by Petitioner was not passed upon below, depriving this Court of a jurisdictional basis for consideration. This Court should decline certiorari accordingly.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,



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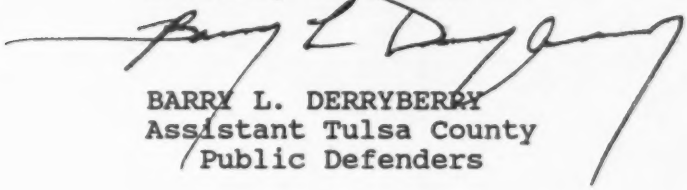

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	)	
JOSE FLORES FLORES,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE BY MAIL
(Respondent's Brief In Opposition)

Respondent, through counsel of record, certifies that pursuant to Supreme Court Rule 29(3), (5)(b) and 33.2 counsel has mailed one copy of the Respondent's Brief in Opposition by first class mail, postage prepaid to:

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